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LYS Capital Holdings Sdn Bhd v Looi Ming Sim (t/a Alam Venture Enterprise)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02(NCVC)(W)-481–03 OF 2014

ABDUL AZIZ AB RAHIM, MAH WENG KWAI AND DAVID WONG JJCA

19 JANUARY 2015

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Contract — Damages — Building contract — Housing developer terminated building contractor for delaying construction works — Developer engaged third party to remedy defective works and complete uncompleted works — Whether trial court wrong to have dismissed developer's claim against contractor for reimbursement of monies paid to third party simply because developer could not prove actual payment of monies — Whether contractor did not dispute third party had completed works nor dispute amount incurred for the works — Whether proof of actual payment to third party unnecessary before developer could claim reimbursement from contractor — Whether developer's liability to pay third party arose upon completion of works entitling developer to sue contractor for recovery

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The appellant, a housing developer, awarded a contract to the respondent to build several houses in a project within a period of six months. Because of delay in the progress of the construction works, the appellant terminated the contract. The respondent sued the appellant in the High Court for balance of monies owing to it under the contract denying there was any delay in the performance of the contract and contending that the termination of the contract was unlawful. The appellant denied it owed the respondent any monies and counterclaimed for RM70,686.36 and another RM974,400 which it alleged were respectively incurred to remedy defective works ('the remedial works') and to complete uncompleted work ('the uncompleted works'). Both those works were carried out by another contractor ('MSB') the appellant engaged after it terminated the contract with the respondent. At the trial, the respondent conceded that MSB had completed the remedial works and the uncompleted works but disputed the counterclaim on the ground the appellant had not adduced any documentary evidence to show it had actually paid MSB for the work done. Holding that the respondent's contract was lawfully terminated on account of its breach and awarding the respondent RM14,330 as the balance due to it under the contract, the High Court dismissed the counterclaim for the reason the appellant had failed to produce any documentary proof to show it had actually paid MSB for the remedial and uncompleted works. The trial court also held that at the time the appellant engaged MSB, which was a sole proprietorship, the latter had not yet been registered as a business entity and therefore it was a non-legal entity at the

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material time. The appellant's instant appeal was against the dismissal of its counterclaim. A

Held, allowing the appeal with costs of RM10,000:

(1) The appellant had adduced ample evidence through the testimonies of its managing director (SD1), the consultant engineer (SD2), the sole proprietor of MSB (SD3) and the evidence of the quantity surveyor's report (P3) to prove that the remedial works and the uncompleted works were carried out and completed by MSB. The completion of the remedial works at a cost of RM79,600 and issues relating to the completion of the uncompleted works were not challenged by the respondent during cross-examination of the appellant's witnesses (see para 21(c) & (d)). B C

(2) Exhibit P3, tendered by the respondent as an agreed document, clearly showed that the respondent had accepted the fact it would cost the appellant an additional RM974,400 to carry out the uncompleted works. The respondent could not now resile from that fact and concession it had made. The court was satisfied on balance of probabilities that the remedial and uncompleted works were in fact carried out by MSB with the reasonable conclusion being the appellant must have paid MSB the sums claimed in its counterclaim despite the absence of invoices, payment vouchers and the like to show that MSB had been paid (see last para of paras 21–22). D E

(3) Unless a conspiracy between the appellant and MSB to defraud the respondent was alleged — which was not the respondent's pleaded case — the court could not see how MSB could or would have completed the works without payment. The respondent had conceded that the works had been completed. As the respondent had breached the contract, it behooved it to reimburse the appellant the moment the appellant's liability arose, ie when MSB had completed the works and not only after MSB had submitted its bills and the appellant had paid them. Even if the appellant had not paid MSB in part or at all, where the liability had not been discharged yet but it was clear that it would be, the appellant could sue the respondent for recovery and the respondent could not argue that the action was premature or that it could not be sued to recover the loss in the absence of evidence the appellant had actually paid MSB to discharge its obligation. The finding of legal liability against the respondent was enough to ground a claim for damages. It was clear that due to the respondent's breach, the appellant by appointing MSB to attend to the defective and uncompleted works had incurred a legal liability to pay MSB, a head of damage which was not too remote (see paras 25 & 27–30). F G H I

[Bahasa Malaysia summary

Perayu, pemaju perumahan, mengawardkan kontrak kepada responden untuk membina beberapa rumah dalam satu projek dalam tempoh enam bulan. Disebabkan kelewatan dalam progres kerja-kerja pembinaan, perayu menamatkan kontrak. Responden menyaman perayu di Mahkamah Tinggi untuk baki wang tertunggak kepadanya di bawah kontrak menafikan terdapat kelewatan dalam pelaksanaan kontrak dan menghujahkan bahawa penamatan kontrak adalah salah di sisi undang-undang. Perayu menafikan ia berhutang dengan reponden apa-apa wang dan menuntut balas untuk RM70,686.36 dan satu lagi RM974,000 yang mana dikatakan masing-masing terjumlah untuk meremedikan kecatatan kerja ('kerja-kerja pemulihan') dan untuk menyelesaikan kerja-kerja yang tidak selesai ('kerja-kerja tidak selesai'). Kedua-dua kerja dijalankan oleh satu lagi kontraktor ('MSB') yang dilantik oleh perayu selepas ia menamatkan kontrak dengan responden. Ketika perbicaraan, responden mengakui bahawa MSB telah menyelesaikan kerja-kerja pemulihan dan kerja-kerja tidak selesai tetapi mempertikaikan tuntutan balas atas alasan perayu tidak mengemukakan apa-apa keterangan dokumentar untuk menunjukkan ia telah membayar MSB bagi kerja yang telah siap. Memutuskan bahawa kontrak responden telah ditamatkan secara sah oleh sebab pelanggarannya dan mengawardkan responden RM14,330 sebagai baki tertunggak kepadanya di bawah kontrak, Mahkamah Tinggi menolak tuntutan balas atas sebab perayu gagal untuk mengemukakan apa-apa bukti dokumentar untuk menunjukkan bahawa ia telah pun membayar MSB untuk kerja-kerja pemulihan dan kerja-kerja yang tidak selesai. Mahkamah perbicaraan juga memutuskan bahawa pada masa perayu melantik MSB, yang merupakan milik tunggal, yang kedua itu belum lagi didaftarkan sebagai satu entiti perniagaan dan oleh itu ia adalah entiti yang tidak sah pada waktu material. Rayuan perayu ini adalah terhadap penolakan tuntutan balasnya.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM10,000:

(1) Perayu telah mengemukakan keterangan yang mencukupi melalui testimoni-testimoni pengarah urusannya (SD1), jurutera perunding, pemilik tunggal MSB (SD3) dan keterangan laporan juruukur bahan (P3) untuk membuktikan bahawa kerja-kerja pemulihan dan kerja-kerja tidak selesai dijalankan dan diselesaikan oleh MSB. Penyempurnaan kerja-kerja pemulihan pada kos sebanyak RM79,000 dan isu-isu berkaitan dengan penyelesaian kerja-kerja tidak selesai tidak dicabar oleh responden sewaktu pemeriksaan balas saksi-saksi perayu (lihat perenggan 21(c) & (d)).

(2) Ekshibit P3, yang dikemukakan oleh responden sebagai dokumen yang dipersetujui, jelas menunjukkan bahawa responden telah mengetahui ia akan menyebabkan kos tambahan kepada perayu sebanyak RM974,400 untuk menjalankan kerja-kerja tidak selesai. Responden sekarang tidak

boleh meninggalkan kedudukannya daripada fakta dan konsesi yang telah dibuat. Mahkamah berpuas hati atas imbangan kebarangkalian bahawa kerja-kerja remedi dan kerja-kerja tidak selesai telah dijalankan oleh MSB dengan kesimpulan munasabah iaitu perayu semestinya telah membayar MSB jumlah yang dituntut dalam tuntutan balasnya walaupun ketiadaan invois, baucar bayaran dan yang sebegitu untuk menunjukkan MSB telah dibayar (lihat perenggan 21–22).

(3) Melainkan satu konspirasi antara perayu dan MSB untuk melakukan fraud terhadap responden telah dikatakan berlaku — yang mana bukan kes yang diplidkan oleh responden — mahkamah tidak dapat melihat bagaimana MSB boleh atau akan boleh menyiapkan kerja-kerja tanpa bayaran. Responden telah mengakui bahawa kerja-kerja telah diselesaikan. Memandangkan responden telah melanggar kontrak, ia bertanggungan untuk membayar semula kepada perayu apabila liabiliti perayu timbul, iaitu apabila MSB telah menyelesaikan kerja-kerja dan tidak hanya selepas MSB telah mengemukakan bil-bil mereka dan perayu telah membayarnya. Jika pun perayu belum membayar MSB sebahagian atau kesemuanya, yang mana liabiliti belum dilepaskan lagi tetapi jelas ia akan dilepaskan, perayu boleh menyaman responden untuk mendapatkan kembali wang dan responden tidak boleh mempertikaikan tindakan adalah pramatang atau ia tidak boleh disaman untuk mendapatkan kembali kerugian dalam ketiadaan keterangan perayu telah pun membayar MSB untuk melepaskan tanggungjawabnya. Dapatan liabiliti undang-undang terhadap responden adalah mencukupi untuk membuat satu tuntutan untuk ganti rugi. Ia adalah jelas bahawa disebabkan oleh pelanggaran responden, perayu dengan melantik MSB untuk menyempurnakan kecacatan dan kerja-kerja tidak siap telah menanggung liabiliti undang-undang untuk membayar MSB, satu kerosakan besar yang tidak begitu asing (lihat perenggan 25 & 27–30).]

Notes

For cases on building contract, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4228–4229.

Cases referred to

Randall v Raper (1858) EB & E 84 (refd)
Total Liban SA v Vitol Energy SA [2001] QB 643, QBD (refd)

Appeal from: Suit No 22NCVC-65 of 2011 (High Court, Ipoh)

Cheong Yau Kheong (Loh & Assoc) for the appellant.
Abdul Malik bin Mat Jadi (Abdul Malik & Co) for the respondent.

Mah Weng Kwai JCA (delivering judgment of the court):

BRIEF FACTS

[1] On 25 October 2010, the appellant/defendant, a housing developer, awarded a contract to the respondent/plaintiff to construct 53 units of single storey terrace houses in Klebang Sanctuary, Mukim Hulu Kinta, Perak.

[2] The lump sum contract price was RM2,866,000 with the period for completion being six months from the date of the notice to commence works.

[3] The respondent commenced construction works and was paid the sum of RM91,347 in two progress payments with the understanding that the balance of payments due to the respondent would be set-off against payments made by the appellant to Sykt WLS Construction Sdn Bhd, the supplier of building materials to the respondent.

[4] The appellant was dissatisfied with the delay in the progress of the construction works by the respondent and proceeded to terminate the contract vide the notice of termination issued on 28 January 2011 (exh D6).

THE RESPONDENT'S CLAIM

[5] The respondent denied that there was any delay in the performance of the contract and averred that the termination of the contract by the appellant was not lawful.

[6] The respondent claimed the sum of RM306,544.84 being made up of the balance of payments due and the cost of materials left on site.

THE APPELLANT'S DEFENCE AND COUNTERCLAIM

[7] The appellant maintained that the termination of the contract was proper and lawful as the progress of works by the respondent was not in accordance with the agreed time schedule set-out in the letter dated 28 December 2010 as pleaded in para 7 of the statement of claim.

[8] The appellant denied there was any outstanding balance payment due to the respondent and averred to the contrary, that they had overpaid the sum of RM5,416.36 after taking into account the sums paid to WLS Construction Sdn Bhd for the materials supplied.

[9] The appellant in their counterclaim alleged that part of the works completed by the respondent were defective and the appellant had to appoint

another contractor Meng Seng Builders ('MSB') to carry out the remedial works. The sum claimed by the appellant for the defection works done was RM70,686.36.

[10] The appellant also complained that the respondent had failed to complete the scope of works within time and was compelled to appoint MSB to complete the respondent's scope of works (the uncompleted works). The sum claimed by the appellant for the construction of uncompleted works was RM974,400.

DECISION OF THE HIGH COURT

[11] After a full trial the learned judicial commissioner allowed the respondent's claim in part only that is, for the sum of RM14,330 being the balance amount owing by the appellant. The learned judicial commissioner held that of the total sum of RM286,600 owing being the value of works completed by the respondent, the sum of RM91,347.50 had been paid directly to the respondent and the sum of RM180,922.50 had been paid to Sykt WLS Construction Sdn Bhd thereby leaving a balance sum of RM14,330 only.

[12] The learned judicial commissioner dismissed the appellant's counterclaim in its entirety solely on the ground that the appellant had failed to prove that it had in fact paid the cost for remedial works and for completing the uncompleted works to MSB.

THE APPEAL

[13] Being dissatisfied with the decision of the learned judicial commissioner, the appellant filed its notice of appeal against part of the said decision namely, against the order dismissing the counterclaim but not against the order to pay the sum of RM14,330 to the respondent.

[14] It will be noted here that the respondent did not file a cross-appeal against the decision allowing the respondent the sum of RM14,330 only, the reason being as stated by counsel for the respondent that the respondent agreed with the finding and decision of the learned judicial commissioner even though the judgment sum awarded was much lower than the original amount claimed by the respondent.

OUR DECISION

[15] Upon reading the record of appeal, the written submissions of counsel for the appellant and the respondent and upon hearing the oral submissions of

counsel aforesaid, the court unanimously allowed the appeal by the appellant on the counterclaim with costs as prayed.

[16] The respondent now applies for leave to appeal to the Federal Court.

GROUNDS OF DECISION

[17] The learned judicial commissioner in his grounds of judgment held that the termination of the contract pursuant to cl 12 therein, by the appellant vide their letter of termination of 28 January 2011, was lawful. This meant that the learned judicial commissioner had accepted that the respondent was in breach in the performance of the contract by reason of the defective works and uncompleted works and as the respondent did not cross-appeal against this finding, this also meant that the respondent had accepted the finding of liability for the breach of the contract.

[18] While the learned judicial commissioner accepted that there were defective works and uncompleted works outstanding as at 28 January 2011 and that the appellant had a valid cause of action (see grounds of judgment — *rekod rayuan* p 31 at para 28), His Lordship nonetheless dismissed the appellant's counterclaim solely on the ground that the appellant had failed to prove that it had paid MSB the cost for carrying out the remedial and uncompleted works.

[19] In para 40 of the grounds of judgment (*rekod rayuan* p 20) the learned judicial commissioner held and we quote:

> Berdasarkan keterangan yang ada, saya mendapati Defendan gagal mengemukakan sebarang bukti kukuh bagi membuktikan tuntutannya. Dari keterangan SD1 dan SD3, kerja baik pulih dan kerja pembinaan semula projek perumahan Defendan telah pun siap dilaksanakan oleh MSB. Adalah tidak munasabah jika Defendan tidak menyimpan sebarang bukti pembayaran kepada MSB bagi projek yang bernilai jutaan ringgit. Tidak ada sijil atau perakuan siap kerja dari arkitek Defendan yang boleh mengesahkan kerja baik pulih dan kerja pembinaan telah pun siap sepenuhnya. Begitu juga tidak ada sehelai pun invois, resit atau apa-apa dokumen sokongan lain dikemukakan sebagai bukti kerja yang ditawarkan kepada MSB yang bernilai RM3,553,800.00 telah dibayar sepenuhnya.

[20] It would appear from para 40 that the learned judicial commissioner had no issue on whether the defective and uncompleted works were in fact attended to and completed but rather was at pains to state that there was no evidence by way of invoices, receipts or other documents to show that MSB had been paid for its work.

[21] We are respectfully of the view that the learned judicial commissioner erred in arriving at the conclusion that he did for the following reasons:

(a) it was not disputed by the respondent that it had not completed the works as alleged by the appellant;

(b) it was not the pleaded case of the respondent that the defective and uncompleted works were not attended to and completed by MSB. In fact in his submission before us, counsel for the respondent conceded that both the works had been completed but just that there was no evidence of payments;

(c) there was ample evidence adduced by the appellant to prove that the defective works were carried out by MSB when we considered the following:

(i) the evidence of Lee Yau Seng ('SD1'), the managing director for the appellant who produced the letter (exh D8) instructing Jurutera Perunding LTC Sdn Bhd, the civil and structural consulting engineers to conduct a site inspection to assess the volume and quality of the construction works performed by the respondent;

(ii) the evidence of Ir Chew Wai Mun ('SD2'), the consultant engineer who tendered three reports (exh D9) and photographs (exh D15) explaining and confirming the nature of the defective works after the site and works inspection (see list of defective works — *rekod rayuan* pp 297–301);

(iii) the evidence of SD1 confirming his instructions to MSB to carry out the remedial works at the quoted price of RM79,600 (exh D10A in the sum of RM64,600 and D10B in the sum of RM15,000);

(iv) the evidence of Chew Chee Seng ('SD3') the sole proprietor of MSB who produced his quotations (exh D10A and D10B) and confirming that the remedial works were completed at the cost of RM79,600; and

(v) the completion of the remedial works at the cost of RM79,600 was not challenged by counsel for the respondent during cross-examination of the appellant's witnesses,

(d) there was equally ample evidence adduced by the appellant to prove that the uncompleted works were in fact carried out and completed by MSB when we considered the following:

(i) the quantity surveyor's report by Mokhnar & Assoc, a firm of quantity surveyors and construction cost consultants (exh P3) prepared on the instructions of the appellant and which was agreed to and tendered by Lam Chee Keong, an undischarged bankrupt ('SP2'), the respondent's husband and manager, stating that the cost to complete the uncompleted works was at an additional cost of RM974,400 (see s 6 of

A the Observations and Conclusion of the Quantity Surveyor's Report at p 222 of the *rekod rayuan*);

(ii) the evidence of SD1 on behalf of the appellant awarding the contract (exh D11) to MSB to complete the uncompleted works at the total cost of RM3,553,800;

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(iii) the evidence of SD3 confirming that the uncompleted works were in fact completed at the cost of RM3,553,800; and

(iv) neither the issue of the non-completion of the uncompleted works nor the issue of the nonpayment of the additional cost to SD3 was raised by counsel for the respondent during the cross-examination of the appellant's witnesses.

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Significantly, it is important to note that exh P3 was tendered not by the appellant but by the respondent, being an agreed document. This clearly showed that the respondent had accepted the fact that it would cost the appellant an additional sum of RM974,400 to carry out the uncompleted works. The respondent cannot now be seen to resile from this fact and concession. It is trite that once a document is agreed upon without qualification, the authenticity of the document and the contents stated therein are no longer in dispute.

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[22] Being satisfied on a balance of probabilities that the defective and uncompleted works were in fact carried out by MSB, we are equally satisfied with the reasonable conclusion that the appellant must have paid MSB the respective sums, although there is an absence of invoices, payment vouchers and the like to show that MSB had been paid.

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[23] We are satisfied that when considering the evidence of SD1, SD2 and SD3 read together with the documentary evidence (the quantity surveyor's report (exh P3) the award of contract for the defective works (exh D10A and D10B) and the award of the contract for the uncompleted works (ext D11) and taken as a whole, there was sufficient evidence adduced by the appellant to prove the counterclaim.

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[24] Central to the arguments in this appeal was not whether the defective and uncompleted works were in fact attended to and completed but rather whether the appellant had paid MSB the cost for completing the same.

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[25] Unless there was an allegation of conspiracy to defraud the respondent hatched between the appellant and MSB, which most certainly was not the respondent's pleaded case, we cannot possibly see how MSB could or would have completed the project without having been paid. Commercial realty dictates that no contractor in his right mind will carry out any construction

works at great cost without payment. At the expense of repetition, it is important to remember that in this case, counsel for the respondent had conceded that the works had been completed before the conclusion of the trial before the learned judicial commissioner.

[26] Once the new contractor had performed its part of the contract it was incumbent on the appellant to pay. The liability of the appellant to pay would arise immediately upon the new contractor completing its work and any delay in payment would in fact amount a debt due and owing by the appellant to the new contractor.

[27] As the respondent was in breach of the contract it behoved the respondent to reimburse the appellant the moment the appellant's liability arose that is, when MSB had completed its work and not only after MSB had submitted its bills and the appellant had paid them.

[28] In *Contractual Duties: Performance, Breach, Termination and Remedies (The Contract Law Library)* by Professor Neil Andrews *et al*, (2011 Ed), in paras 21–118 at p 420 it was stated that 'if a breach causes the claimant to incur a legal liability to a third party and pay it, then (assuming the loss is not too remote) that is no difficulty: the liability is clearly an admissible head of damages'. In our case it is clear that due to a breach of contract by the respondent, the appellant by appointing MSB to attend to the defective and uncompleted works had incurred a legal liability to pay to MSB, the third party, a head of damage which was not too remote.

[29] The essential issue to be determined by the court was whether payment to MSB by the appellant was actually necessary before the appellant could claim against the respondent. Taking for a moment that the appellant had not paid MSB in part or at all, we are of the view that where the liability has not been discharged yet but it is clear that it will be then it is trite that the appellant can sue the respondent for recovery (see *Randall v Raper* (1858) EB & E 84). It is not open to the respondent to argue that the action is premature or that the appellant cannot sue to recover the loss in the absence of any evidence that the appellant has actually paid MSB to discharge its obligation.

[30] In the final analysis, we are of the view that the finding of legal liability against the respondent was enough to ground a claim for damages (see *Total Liban SA v Vitol Energy SA* [2001] QB 643). In any event the respondent's case was not that there was no liability on the part of the appellant to pay MSB but just that there was no evidence of any payment.

[31] A further issue that needs mention was whether MSB was a properly registered business as at 10 March 2011, the date of the award of the contract

by the appellant. The learned judicial commissioner held in para 42 of his grounds of judgment that as MSB was only registered on 24 March 2011, it was clear that the appellant had contracted with an entity which was not then in existence and drew an adverse inference that there were no supporting documents between the appellant and MSB to support the appellant's claim. Respectfully, we are of the view that the learned judicial commissioner had clearly erred when he made that inference. A perusal of exh P14, the search results on MSB issued by Suruhanjaya Syarikat Malaysia showed that MSB is a sole proprietorship and the sole proprietor is Chew Chee Seng, SD3. The legal entity in this case is Chew Chee Seng, an individual, while MSB is the business name. There was no issue of the appellant contracting with a non-legal entity.

[32] In any event it must not be overlooked that the issue of 'legal entity' was not pleaded by the respondent in the statement of claim and neither was it an agreed issue to be tried by the learned judicial commissioner. It was a non-issue as far as the respondent was concerned and it was incorrect for the learned judicial commissioner to rely on it as a ground to hold that the appellant had not proved its case on a balance of probabilities.

[33] In the result the appeal was allowed with costs of RM10,000 here and below. The deposit was ordered to be refunded.

Appeal allowed with costs of RM10,000.

Reported by Ashok Kumar